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WHAT CAN WE LEARN FROM PRIMITIVE LAW? – AN IN-DEPTH ANALYSIS OF THE INTERSECTIONS BETWEEN LAW, PHILOSOPHY AND ANTHROPOLOGY THROUGH MALINOWSKI'S WORKS

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What can we learn from primitive law? – an in-depth analysis of the intersections between law, philosophy and anthropology through Malinowski's works.

Federica Martiny

Abstract: The subject of primitive law, the study of the various forces producing order and cohesion in a savage tribe, might lead us to investigate phenomena that from the point of view of Western societies are not included in the conventional study of law. Specifically, we will primarily analyze the meaning of reciprocity and secondly the difference between the *law in breach* and the *restoration of order*.

Keywords: Malinowski, legal anthropology, reciprocity, primitive law.

1. In the following pages I will consider Bronisław Malinowski's concepts of law, legal obligation and legal rights from a legal and philosophical point of view.

Malinowski was a famous Polish anthropologist[1], known for his studies on the *Kula Ring,* a ceremonial exchange system of Papua New Guinea[2], and for developing the theory of

[1] Bronisław Malinowski (1884–1942) is arguably one of the most influential anthropologists of the 20th century. Born in Kraków, Poland, to an aristocratic family, Malinowski attended Jagiellonian University, receiving a PhD in philosophy, mathematics, and physics in 1908. In 1910 he pursued an interest in anthropology at the London School of Economics under the guidance of Charles. In 1914, while attending anthropological meetings in Australia, World War I broke out and, although technically an enemy alien and under some restrictions, he received financial assistance from the Australian government to conduct research among the people of Mailu, even if he wrote to his Master «dramatizing his enemy status in Papua as "a prisoner of war"», YOUNG, M. W., *Odyssey of an Anthropologist. 1884-1920*, Yale University Press, New Haven and London, 2004, p. 326.
The list of his students includes Raymond Firth, E. E. Evans-Pritchard, Audrey Richards, Edmund Leach, Ashley Montagu, Meyer Fortes and Isaac Schapera.

[2] The *Kula ring* spans many island communities of the Massim archipelago, including the Trobriand Islands, and involves thousands of individuals and it is a ceremonial exchange of red shell-disc necklaces (called *soulava*), traded to the north (circling the ring in clockwise direction), and white shell armbands (*mwali*), traded in the southern direction (circling counterclockwise), so that each necklace is exchanged for an armband and vice versa. It was firstly described by Malinowski in his main work, *Argonauts of the Western Pacific. An account of native enterprise and adventure in the Archipelagoes of Melanesian New Guinea,* Routledge, London, 1922.
An interesting thing to specify is the fact that the *Kula* exchange is accompanied by general trade and it is a classic example of Marcel Mauss' distinction between gift and commodity exchange. See MAUSS, M., "Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques*"*, *Année sociologique*, 1923-1924.

participatory observation[3] (*Argonauts of the Western Pacific*, 1922). However, his analysis of primitive law (*Crime and custom in primitive societies*, 1926) and the legal significance of the *Kula* ceremonial exchange is less well-known.

However, William Seagle, an American lawyer and jurist, has explored Malinowski's ideas on law. He concluded that Malinowski's functionalism «has exercised a pervasive influence upon modern jurisprudence, and he is really entitled to be regarded as the sire of realists, neo-realists and ultra-realists[4]». This is perhaps no surprise as, during World War II, Malinowski moved to Yale University at a time when its Law School was «the center of [the] legal realism movement[5]». In an in-depth review of Llewellyn and Hoebel's *The Cheyenne Way* (*The Cheyenne Way*: *Conflict and Case Law in Primitive Jurisprudence,* 1941), for example, Malinowski argued for «the relevance of "primitive" legal studies to broader jurisprudential questions[6]».

My aim is to illustrate that Malinowski's theory of primitive law is interesting because it could be useful for re-defining law in multicultural and intercultural societies; a legal system reflects many facets of a society and this is the reason why some assumptions of the anthropology of law can be useful to understand our complex societies and the conflicts within.

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[3]He stated that the aim of the anthropologist is «to grasp the native's point of view, his relation to life, to realize his vision of his world» (*Argonauts of the Western Pacific*, Dutton 1961 edition, p. 25). It exhorted anthropologists to give up their comfortable position on the veranda of the missionary compound or government station and to go and live and work with the people they studied: participatory observation relied on the cultivation of personal relationships with local informants as a way of learning about a culture, involving both observing and participating in the social life of a group. As Young explains «Malinowski famously wrote of his arrival in the Trobriand Islands: "Imagine yourself suddenly set down surrounded by all your gear, alone on a tropical beach close to a native village, while the launch or dinghy that has brought you sails away out of sight". The heroic figure of the lone ethnographer – or "the image of the old-fashioned castaway" – was a literary device, but close enough to the truth of Malinowski's experience to serve as the opening image of the myth that he would spin of the archetypal Ethnographer. He transposed this arrival scene to the Trobriands, but it properly belongs to Mailu», seeYOUNG, M. W., *Odyssey of an Anthropologist,* p. 328. See also YOUNG M. W., *The Ethnography of Malinowski. The Trobriand Islands 1915-1918*, Routledge and Kegan Paul, London and New York, 1979. When his personal diary, written during his fieldwork in Melanesia and New Guinea, was published posthumously in 1967 by his widow Valetta Swann set off a storm of controversy due to the private prejudices against his interlocutors expressed by the author. See URRY, J., FARDON, *R.,* "Would the Real Malinowski Please Stand Up?", *Man, New Series,* 27, 1, 1992, p. 179-182.

[4] SEAGLE, W., "Primitive Law and Professor Malinowski", *American Anthropologist,* 39 (2), 1937, p. 290.

[5] CONLEY, J. M., O'BARR, W. M., "Back to the Trobriands: The Enduring Influence of Malinowski's Crime and Custom in Savage Society. Review of Crime and Custom in Savage Society", *Law & Social Inquiry,* 27, 4, 2002, p. 854.

[6] Ibidem.

Specifically, there two ideas that Malinowski promoted that this essay is concerned with. Firstly, he «questioned the thesis according to which law is a product of very few and therefore privileged societies[7]». Secondly, he «was the first to address the related issues of the nature and universality of law, indictively, literally from the ground up[8]». In these ways, Malinowski promoted the de-Westernization of law and, by doing so, can be compared to the position of legal post-modernism[9] that is critical of the supposed universality of the law and «rejects the belief in stable, transcontextual foundations[10]».

To accomplish this aim, I will consider Malinowski's broader scientific production. Isaac Shapera, the social anthropologist, points out that the concept of law expressed by Malinowski changed over time. Before his experience in the Trobriand Islands (*The family among the Australian Aborigines: a sociological study*, 1913), Malinowski's views on law were similar to the idea of social norms, insofar as he claimed that different types of norms were identifiable through the type of "social" or "collective" sanction with which they were associated. He defined legal norms as the norms that are followed by a direct, organized and defined social action (*Malinowski's Theory of Law*, 2016). If these norms did not exist, in other words, the social reaction would be reduced to mere violence, and, on the other hand, without the social reaction the norms could not be defined as having a legal quality.

The main difference that Shapera notices concerns Malinowski's distinction between civil law and criminal law. In the first phase of Malinowski's reflection, all the rules governing social life and strengthening social cohesion were included within the category of civil law, while the idea of the taboo – as prohibition, and as law in the broad sense, followed by some kind of supernatural sanction – were included within the category of criminal law. Even in *Crime and Custom,* Malinowski argued that what we call civil law, as

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[7] STĘPIEN M., "Malinowski's Multidimensional Conception of Law: Beyond Common Misunderstandings", in STĘPIEN M. (ed.), *Bronisław Malinowski Concept of Law,* Springer, Switzerland, 2016, p. 44.

[8] CONLEY, J. M., O'BARR, W. M., "Back to the Trobriands: The Enduring Influence of Malinowski's Crime and Custom in Savage Society", cit., p. 866.

[9] See Paolo Grossi' works such as *Introduzione al Novecento giuridico,* Laterza, Roma-Bari, 2012 and L'*invenzione* del diritto, Laterza, Roma-Bari, 2018. Grossi is a distinguished historian of law and Italian judge, former President of the Constitutional Court of Italy. He addressed legal pluralism as a characteristic of law in the Middle Ages and he criticizes the dominant legal reductionism, promoting the idea of law as a social institution.

[10] MINDA, G., *Postmodern Legal Movements: Law and Jurisprudence At Century's End,* NYU Press, New York; London, 1995, p. 225 JSTOR, www.jstor.org/stable/j.ctt9qg2gf.17. See in general the chapter "Postmodern Jurisprudence".

opposed to criminal law, corresponds to a system of rules obeyed and respected.But, in the second phase of reflection, according to Shapera, our author explains the mechanism behind the obedience of civil laws as emerging from the idea of reciprocity, according to which a certain behavior is considered a duty for one individual and a legitimate right for another. In other words, reciprocity is based on the sense of duty and on the need for cooperation, and not on the fear of incurring a supernatural sanction:

> «the real reason why all these economic obligations are normally kept, and kept very scrupulously, is that failure to comply places a man in an intolerable position, while slackness in fulfillment covers him with opprobrium. The man who would persistently disobey the ruling of law in his economic dealings would soon find himself outside the social and economic order[11]».

This set of rules, according to Malinowski, defines family relationships[12], marriage, economic relations and the exercise of power; on the other hand, "the fundamental rules that safeguard life, property and personality form the class which might be described as "criminal law[13]".

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[11] MALINOWSKI, B., *Crime and custom in primitive societies*, Harcourt, Brace and Company, Inc., New York, Kegan Paul, Trench, Turner and Co, London, 1926, p. 41.

[12] The author states that the main principle of law in the Trobriand matrilineal society, which means that the lineage is traced maternally and not paternally as is the case in our societies (see MALINOWSKI, B., *Sex and Repression in Savage Society*, London, Kegan Paul, Trench, Trubner & Co, 1927 and *The Sexual Life ofSavages in North-Western Melanesia. An Ethnographic Account ofCourtship, Marriage, and Family Life Among the Natives of the Trobriand Islands,* British New Guinea, Eugenics Publishing, New York, 1929) is Mother-right. It is the basis of the relationship of reciprocity between a man and his sister's family (in *The Father in Primitive Psychology,* Kegan Paul, Trench, Trübner & Co, London, 1927 Malinowski described the supposed ignorance of physiological paternity and questioned Freud's Oedipus complex in a matrilineal society). More generally, «what perhaps is more remarkable in the legal nature of social relations is that reciprocity, the give-and-take principle, reigns supreme also within the clan, nay within the nearest group of kinsmen. (…) the relation between the maternal uncle and his nephews, the relation between brothers, nay the most unselfish relation, that between a man and his sister, are all and one founded on mutuality and the repayment of services», MALINOWSKI, B., *Crime and custom in primitive societies,* 1926, cit, pp. 47-48.

[13] MALINOWSKI, B., *Crime and custom in primitive societies, cit,* 1926, p. 66.

2. Whilst the previous section considered how Malinowski's ideas changed during his life, this section will explore his attitudes to law more generally. In *Crime and Custom*, Bronisław Malinowski proposes a "minimal definition" of law: legal norms are identified on the basis that in «all societies there must be a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to individuals to be enforced by an abstract agency[14]». This definition implies a distinction between the legal world and the social world as a whole, which is made of moral and religious norms irreducible to the legal sphere.

To fully grasp this conception, Malinowski argues that it is necessary to understand what the function of the law is. The fundamental function of law is to suppress certain natural propensities, to control human instincts and to impose non-spontaneous and coercive behaviour. The law thus ensures a kind of cooperation based on mutual concessions for a common purpose. This function seems to embody the possibility of building and maintaining human coexistence. The idea of repressing instincts recalls a position expressed by Norberto Bobbio, an italian philosopher of law and politics, a few decades later. He wrote that history can be imagined as an immense river embankment: the embankments are t6he rules of conduct, including religious, moral, juridical and social obligations. These rules contain the "current of passions", like one's interests and instincts, within certain limits and enable the formation of stable societies[15].

In the same work, Malinowski continues his exploration of social interaction by investigating the ritualized exchanges of fish and yams, the socalled *wasi,* routinely taking place between individuals of coastal and inland villages. «The idea of the reciprocities complex leads us to the historical or genetic dimension of social interaction[16]», writes Alvin Gouldner, an American anthropologist and sociologist. Gouldner explains how Malinowski, in his analysis of the *Kula* exchange, carefully emphasizes that gifts given are not immediately returned, and asks how one could understand this interval of time. He argues that this time period is governed by the norm of reciprocity in a double sense: «First, the actor is accumulating, mobilizing, liquidating or earnmaking resources so that

[14] Ivi, p. 67.
[15] BOBBIO, N., *Teoria generale del diritto,* Giappichelli, Torino, 1993.
[16] GOULDNER, A. W., "The Norm of Reciprocity: A Preliminary Statement", *American Sociological Review*, 25, 2, 1960, p. 174.

he can make a suitable repayment. Second, it is a period governed by the rule that you should not do harm to those who have done you a benefit[17]».

The principle of reciprocity is placed in the centre of Malinowski's *Crime and Custom*, replacing a «narrow and rigid conception of the problem - a definition of "law" as a machinery of carrying out justice in cases of trespass[18]»:

> «the element or the aspect of law, that is of effective social constraint, consists in the complex arrangements which make people keep to their obligations. Among them the most important is the manner in which many transactions are linked into chains of mutual services, every one of them having to be repaid at some later date[19]».

Firstly, «the rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another»; secondly, «thay are sanctioned not by a mere psychological motive, but by a definite social machinery of binding force, based, as we know, upon mutual dependance, and realized in the equivalent arrangement of reciprocal services, as well as in the combination of such claims into strands of multiple relationship[20]».

As Laura Nader explains in her essay *The Anthropological Study of Law*, as far as the debate in the anthropological field is concerned, the theme of universal characteristics of law remained in the background until Malinowski's reflection[21]. It is in the context of the search for the universal characteristics of law that the choice to adhere to a functional definition rather than a formal one must be framed; it places a significant distance from

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[17] Ibidem.
[18] MALINOWSKI, B., *Crime and Custom in Savage Society,* cit., p. 31.
[19] Ivi, p. 32.
[20] Ivi, p. 55.
[21] NADER, L., "The Anthropological Study of Law", *American Anthropologist. New Series,* 67, 6, 1965, pp. 6-8.

the formal position adopted by Alfred Radcliffe-Brown, who is considered, together with Malinowski, as the father of British modern social anthropology.

According to Malinowski, the definition of law must be framed within the functional and institutional analysis of cultural responses to the fundamental biological needs of individuals. The Polish anthropologist makes two additional points to support this position. Firstly, he argues that all primary problems of human beings are solved through organization in cooperative groups, and also through the development of knowledge of values and ethics (*A Scientific Theory8 of Culture and Other Essay*, 1942). Secondly, he states that fundamental needs and cultural satisfaction can generate new cultural needs imposed by the tendency to extend security and well-being.

3. In the last phase of his life, Malinowski repositioned the centrality of the principle of reciprocity in his aforementioned review of *The Cheyenne Way*. he argued that law is a system of principles deeply rooted in the way in which human culture and society develop. Law constitutes, first and foremost, the framework that outlines the establishment of the institutions through which men organise the collective dimension of their existence. With these arguments, Malinowski maintained a distance from the Austinian-Benthamian paradigm, and retained ideas produced by the Historical School of Law and some insights of juridical realism and and anti-formalistic theories. This perspective also led him to compare primitive and codified legal systems:

> «The authors are fully aware that the cross-fertilization of jurisprudence by the study of primitive law is beneficial for both. In the study of communities where law is neither codified nor administered before courts, nor yet enforced by constabulary, certain problems arise which can be easily overlooked in a jurisprudence based on our own formal and crystallized systems. Why have men to obey certain rules? Why have such rules to be known by the actors, formulated, and made valid? Why is the validity of

> some such rules never questioned, while others seem to offer constant temptation to breach?[22]»

Mateusz Stępień, a contemporary Polish sociologist of law, analyzed conceptions of law from biological[23], social and psychological perspectives. In any partial process of culture, men, organized and fitted out with artifacts, follow the rules of technique determined by what he improperly called natural law. The same could be said of any other technical achievement by concerted and organized action, like the co-ordination of food gathering, hunting, fishing or agriculture. Such rules carry a sociological quota and are symbolically formulated. This «is the universal determinism based on the fact that man has always primarily to satisfy his basic organic needs; that in doing this by creating the artificial environment of culture, he [man] has to act under conditions of order, continuity, predictability, and authority[24]». Thus,

> «in all this the fundamental rules of behavior defining the relations between individuals and groups re-appear once more, as an integral part of the determinism of culture. Agreements between individuals through contract; rules of conduct based on birth and status; reciprocal concatenations of duties which establish such typical relations as between husband and wife, parents and children, kinsmen and clansmen; the duties and privileges of status, rank, and authority, occur throughout and are invariably true to type[25]».

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[22] MALINOWSKI, B., "A new instrument for the study of law – especially primitive", *The Yale Law Journal,* 51, 8, 1942, p. 1238.

[23] Stępień states that Malinowski's position «is best described as "soft" naturalism», instead of cultural determinism. See STĘPIEN M. "Malinowski's Multidimensional Conception of Law: Beyond Common Misunderstandings", in STĘPIEN M. (ed.), *Bronisław Malinowski Concept of Law,* cit. p. 47.

[24] MALINOWSKI, B., *A new instrument for the study of law – especially primitive*, cit., p. 1241.

[25] Ibidem.

Malinowski was aware that «the term *law* obviously means in this context something essentially different from *law* as rule traditionally established or promulgated, obeyed, or broken and enforced[26]». Nonetheless, all these laws had to be transmitted from generation to generation, either verbally or in standardized behavior. An important distinction thus arises between «(1) rules of cultural determinism accepted, but neither known nor stated; and (2) rules explicitly standardized and formulated in early symbolic gesture or sound[27]». Within this second type, there is a further distinction between two aspects: firstly, those rules whose sanction is automatic and consists in the ineffectiveness, namely all those rules underlying cooperation in technical activities; and, secondly, those rules whose sanction instead derives from the convenience of conformity to tradition, or the conventions that regulate human relations in daily life – in this sense, one can emphasize that there is no real difference between the value of uniformity and standardization of behaviour in a primitive society or in our contemporary mass society –. Malinowski unpacks this idea as follows:

> «As soon as a rule curbs certain physiological propensities or delimits the advantages and claims of two or more parties, there enters the element of divergent interest. Thus rules referring to the distribution of food, rules related to sex, to authority, to privilege, and duty respectively; all the rules which impose more effort and less reward on a class, group, or individual for the advantage of another, have to be sanctioned. Here enter also the rules which protect life and property, and prevent bodily harm between individuals, that is, rules of criminal law. There must exist in all these cases definite codes known and accepted by those concerned. There is here always a temptation to evade, to stretch, or to break such rules. Hence disputes, early forms of litigation and of adjustment do occur at a primitive level. In the course

[26] Ivi, p. 1242.
[27] Ibidem.

> of evolution the stretching and the breaking of law produce the machinery of law in our modern sense[28]».

This passage in *A New Instrument for the Study of Law*, points towards two extra meanings of Malinowski's conception of law: (3) «rules of conduct which refer to relations between individuals and groups, delimit divergent interests, and curtail disruptive physiological and sociological tendencies»; and, last but not least, (4) «the specific mechanism which is brought into existence when a conflict of claims arises or a rule of social conduct is broken[29]», the *law of order and law maintained*, on the one hand, and *the retributive and restitutive social action*, on the other.

Refusing to apply legal Western categories to primitive societies, Malinowski examined the "Law in Breach" and the "Restoration of Order" within a theoretical perspective based on the idea of different systems of laws-in-conflict. Since, in Western tradition, central authority, codes, courts and constables are supposed to exist in order to enforce laws, many anthropologists had thought that law was followed spontaneously and automatically in native communities[30], producing in their minds the image of individuals in native communities as robots with no free will. On the contrary, Malinowski insisted on the existence of binding obligations which could be classified as legal rules[31].

The main difference between primitive law and our modern legal system is pretty clear according to our author:

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[28] Ivi, 1243.

[29] Ibidem.

[30] See HARTLAND, E. S., *Primitive Law,* Methuen & Company Limited, London, 1924 and LOWIE, R. H., *Primitive Society,* Boni and Liveright, New York, 1920.

[31] In such a framework, we should underline the function of two main influences of criminal law: on the one hand, the importance of sorcery as a force of conservation and maintenance of the established order, and on the other hand, the imperative to commit suicide when the illegal action accomplished is particularly serious. The analysis of sorcery and suicide shows the essentially private nature of the Melanesian penal justice; crimes that affect people in life, in safety, in property, in honor are private affairs to be dealt with among those who are involved, their families and friends, but not public authorities. The private and "negotiating" dimension of this kind of criminal justice can be deduced from the fact that the law of retaliation could be replaced by the "price of the blood" (called lula in native language), an institution formerly born in the context of the stipulation of peace after a war. It was the idea to give compensation to the enemy part for any man killed or wounded, and it was then transplanted in cases of murder, as a retribution involving part of the community.

> «the lawyer qua craftsman must primarily be interested in law breaking, in guiding of the clients' conduct so as to prevent punishment if not breach, in framing contracts and effecting compromises. All this brings about his professional involvements and his financial emoluments. The sociologist and the ethnographer on the other hand must primarily be interested in the working of social control, that is, in the maintenance of order[32]».

In the last pages of this last wor, Malinowski reiterated the importance of considering all the meanings of the term *law*, not just the fourth. As Stępień points out when describing the social dimensions of law, in fact, «the main goal of law is to provide continuity of mutual services and to enable people to fulfill their obligations[33]», and to co-operate. And this statement seems to be valid also in relation to the future: «the foundations of the future international law of collective security, collective prosperity, and collective interchange of universally human services will have to be built on order, and on the vision of what must come[34]». These words reflect the author's hope during World War II.

4. More generally, the idea of relationality as a constitutive social factor is an understanding that can be found, though with different nuances of meaning, in many authors –they have traced historiographically the anti-formalistic theories of law, from the supporters of the Interessenjurisprudenz, to those who identified themselves with the Freirechtzbewegung, and to the French authors of the Belle Époque –. However, the thinker whose thought seems closer to Malinowski is Eugen Ehrlich. Precisely because of the distinction just mentioned, Ehrlich, in fact, maintains that the organization of

[32] Ivi, 1246.
[33] STĘPIEN M. "Malinowski's Multidimensional Conception of Law: Beyond Common Misunderstandings", in STĘPIEN M. (ed.), *Bronisław Malinowski Concept of Law,* cit., p. 49.
[34] MALINOWSKI, B., *A new instrument for the study of law – especially primitive,* cit., p. 1248.

society is constituted first of all by the spontaneous and general observance of the rules that have been established, rather than on the coercive-sanctioning aspect[35].

Another parallel can be drawn with the socalled legal institutionalism, an approach to the theory of law developed in the late nineteenth and early twentieth centuries in continental Europe by a number of scholars who were opposed to statalism and normativism[36]. The key concept for authors such as Maurice Hauriou and especially Santi Romano is the notion of institution. In particular, the Italian jurist advanced a definition of law as a juridical order, a notion which in turn leads back to that of institution, meaning any social entity[37]. In relation to the institution, as far back as The Sexual Life of Savages (1929), Malinowski proposed that society consists of a series of organized systems of behavior, or institutions, writing that family must be understood as the cell of society, the fundamental nucleus that, at the same time, constitutes the origin and the foundation of the emerging human organization. Stępień, on the other hand, underlines that:

> «Malinowski did not commit the functionalist fallacy in that all social institutions exist because they serve certain functions to the society in which they are practiced. When analyzing law as part of the Trobriand's social world, he took a heuristic hypothesis of its functionality, knowing that there might be other possibilities (1926a, p. 74; 1936a, p. 449; 1944/1961, p. 170). He pointed out that the world of culture is not consistent, but rather a dynamic whole within which there are also some contradictions[38]».

[35] See EHRLICH, E., *Grundlegung der Soziologie des Rechts*, Duncker and Humblot, Munich und Leipzig, 1913.

[36] See PINTORE A., "Institutionalism in Law", in Craig, E. (gen. ed.), *Routledge Encyclopedia of Philosophy*, Version 1.0, 1998.

[37] See ROMANO, S., *L'ordinamento giuridico* (Juridical Order), Florence, Sansoni, (1917-18),2nd edn, 1946.

[38] STĘPIEN M. "Malinowski's Multidimensional Conception of Law: Beyond Common Misunderstandings", in STĘPIEN M. (ed.), *Bronisław Malinowski Concept of Law,* cit., pp. 49-50.

At this point in my argument, I have to mention the Malinowskian position on the difference between positive or negative interpretations of human nature from an anthropological point of view. The reference to the "biological imperative of self-preservation" is not the premise for an intrinsically warlike definition of human nature; on the contrary, the norm of reciprocity is independent of the claim to define the original and fundamental characteristics of human nature[39]. We cannot derive a positive or negative vision of the human being as we can find in Jean-Jacques Rousseau or in Thomas Hobbes respectively. In other words, the functional analysis presented by Malinowski does not coincide with an ontologically defined assumption; the emergence of cooperation and social solidarity is explained by the need to satisfy basic needs, rather than in terms of an ontologically precultural gregariousness[40]. We can nevertheless state, therefore, that according to Malinowski «to be human is to live in cooperative groups, which entails the presence of legal forms [41] », and also, specifically, reciprocal relationships.

As I stated at the beginning, the subject matter is an area of civil law. But what can we say about criminal law? James M. Donovan points out that the category of reciprocity is nowhere mentioned in the second section of *Crime and Custom in Savage Society*, which is dedicated precisely to criminal law. This means that criminal law cannot be explained by the same category of reciprocity, and the consequences that can be drawn are theoretically relevant: «if criminal law cannot be explained by reciprocity, or by some structurally similar element that is equally "inherent in the structure" of societies, Malinowski cannot argue that criminal law is culturally universal in the same way he had just achieved for civil law[42]».

This brings us back to the importance of the third meaning of the concept of law identified in the review of *The Cheyenne Way*: the *law of order and law maintained.* This is exactly what we can learn from the study of primitive law.

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[39] MALINOWSKI, B., "The Deadly Issue", *Athlantic Monthly*, 158, 1936, pp. 659-669 and Malinowski's Archive, LSE Library, MALINOWSKI/22/3.

[40] See MALINOWSKI, B., *The Sexual Life of Savages in North-Western Melanesia. An Ethnographic Account of Courtship, Marriage, and Family Life Among the Natives of the Trobriand Islands,* cit., 1929.

[41] DONOVAN, J. M., "Reciprocity as a Species of Fairness: Completing Malinowski's Theory of Law", in STĘPIEN M. (ed.), *Bronisław Malinowski Concept of Law,* cit., p. 88.

[42] Ivi, 89.

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